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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL M. O'BRIEN et al.,

Plaintiffs and Appellants,

v.

HAROLD G. KELTNER et al.,

Defendants and Respondents.

D044618

(Super. Ct. No. GIC823494)

APPEAL from a judgment of the Superior Court of San Diego County, J. Richard Haden, Judge. Reversed.

Michael and Mary Ann O'Brien prevailed in a prior lawsuit brought against them by an unincorporated association and were awarded costs and attorney fees. In the current action, the O'Briens sued the six individuals who were members of the unincorporated association, alleging these individuals were legally responsible for the costs and attorney fees awarded in the prior judgment. These defendants successfully brought a motion to strike the complaint under California's anti-SLAPP statute. (Code

Civ. Proc.,¹ § 425.16.) We conclude the O'Briens' complaint is not subject to the anti-SLAPP statute, and therefore reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In December 2000, an entity designated as "Green Valley Estates Control Committee" (Control Committee) brought an action against the O'Briens, alleging the O'Briens violated a Declaration of Restrictions (CC&R's) prohibiting a property owner from maintaining horses on his or her property. The Control Committee was composed of six individuals who had been appointed to the committee in 1999 by or through the former directors of the original corporate developer. This corporate developer, however, had dissolved many years before the attempted appointment of these members.

In this prior litigation, the superior court granted summary judgment in the O'Briens' favor, finding that the Control Committee was not a valid legal entity and thus had no authority to extend the CC&R's January 2000 termination date. The court awarded the O'Briens \$21,840.45 in costs and attorney fees against the Control Committee, based on an attorney fees provision in the CC&R's.

In an unpublished opinion, this court affirmed the judgment, agreeing that the appointment of the new Control Committee members in 1999 was not within the dissolved corporation's limited statutory authority to wind up its affairs. (*Control Committee for Green Valley Estates v. O'Brien* (June 10, 2003, D039921).) We held the "new Control Committee and its members had no legal authority to extend the [CC&R's],

¹ All unspecified statutory references are to the Code of Civil Procedure.

to take action against the O'Briens for their alleged violation, or even to maintain this lawsuit in the name of the Control Committee." We ordered the Control Committee to pay the O'Briens' costs on appeal (later determined to be \$28,600).

Six months later, the O'Briens brought the current action against the six individual members of the Control Committee (collectively Committee Members), seeking to hold these individuals responsible for the attorney fees and costs imposed in the prior judgment.² The O'Briens alleged that one of these defendants, Harold Keltner, "initiate[d]" the prior legal proceedings against them, and the five other individual defendants "authorized and directed" Keltner to do so. The complaint described the procedural background of the prior lawsuit and judgment and alleged that the Control Committee has never paid the attorney fees or costs and has "ceased to exist." Based on these allegations, the O'Briens claimed they were entitled to recover from the Committee Members the amount of the attorney fees and costs awarded against the disbanded Control Committee.

In response, the Committee Members filed an anti-SLAPP motion, asserting that section 425.16 governs the complaint because the O'Briens' action arises from the Committee Members' exercise of their constitutional right of petition (filing of the prior complaint). The O'Briens countered that the anti-SLAPP statute was inapplicable

² The complaint identified these Control Committee Members as Harold Keltner, Robert Wistort, Barbara Frost, Robert Graves, Ronald Walrod and Thomas Hommel.

because their action was essentially a collection action under section 1908, subdivision (b).³

After considering these arguments, the court found the anti-SLAPP statute governed the action because the Committee Members "are being sued for having authorized the Committee to sue [the O'Briens] in the underlying suit, an exercise of their First Amendment right to petition by filing litigation." The court additionally concluded the O'Briens did not meet their burden to show they would prevail on the merits under section 1908, subdivision (b) or under the collateral estoppel doctrine.

The O'Briens appeal.

DISCUSSION

The anti-SLAPP statute provides a procedural mechanism to obtain early dismissal of nonmeritorious claims "arising from any act" of a defendant "in furtherance of" the defendant's "right of petition or free speech under the United States or California

³ Section 1908, subdivision (b) provides: "A person who is not a party, but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound. [¶] At any time prior to a final judgment, . . . a determination of whether the judgment, verdict upon which it was entered, or a finding upon which it was entered is to be binding upon a nonparty pursuant to this subdivision or whether such nonparty is entitled to the benefit of this subdivision may, on the noticed motion of any party or any nonparty . . . be made in the court in which the action was tried or in which the action is pending on appeal. If no such motion is made before the action becomes final, the determination may be made in a separate action. If appropriate, a judgment may be entered or ordered to be entered pursuant to such determination."

Constitution in connection with a public issue" (§ 425.16, subd. (b)(1).) To prevail on a motion to strike under the anti-SLAPP statute, the defendant has the initial burden to show "the challenged cause of action is one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If the defendant meets this burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Ibid.*)

In attempting to satisfy their threshold burden, the Committee Members argue that the O'Briens' complaint was based on the Committee Members' filing the prior lawsuit against the O'Briens and therefore the O'Briens' complaint "arose from" the Committee Members' exercise of their constitutional right of petition. This argument is premised on an improper application of the anti-SLAPP statute's "arising from" requirement.

To show an action "arises from" protected activity, the moving party must establish that the cause of action was "*based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten, supra*, Cal.4th at p. 89; accord *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78.) "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such." (*Navellier, supra*, at p. 89.) Instead, "the anti-SLAPP statute's definitional focus" is whether the defendant's activity "*that gives rise to his or her asserted liability . . . constitutes protected speech or petitioning.*" (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 92, italics added; see *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1398-1399.)

In this case, the asserted basis for the Committee Members' liability is their status as members of the entity that brought the prior lawsuit, an entity that had no valid legal existence apart from its members. The O'Briens are thus seeking to hold the Committee Members liable for the prior cost and fee awards because of these parties' *relationship* to the underlying plaintiff entity and the fact a judgment was entered against this entity. This asserted basis for liability does not encompass a constitutional petitioning or free speech right because it arises from the judgment itself and not from the act of filing the prior lawsuit. Thus, although the prior lawsuit was a necessary predicate to the judgment, the alleged liability of the current defendants is based on the existence of the judgment and not on the prior litigation activities.

The Committee Members' attempt to analogize this case to a malicious prosecution action is unavailing. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083.) The courts have held that a malicious prosecution claim "arises from" the constitutional right of petition because the essence of the claim is that the underlying plaintiffs filed litigation that was improper because it was brought with a malicious motive and without probable cause. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at pp. 741-742; *Chavez v. Mendoza, supra*, 94 Cal.App.4th at p. 1087-1088.) In this case, the basis of the lawsuit is not that the Committee Members' action of filing the prior action (or instigating the filing of the prior action) was improper, but that the current defendants may be held liable for the prior judgment because they are legally responsible for the judgment based on their relationship with the underlying plaintiff.

The Committee Members argue that the fact the O'Briens' complaint describes the prior litigation history necessarily shows the complaint was "based on" the prior petitioning activity (the prior lawsuit). However, the applicability of the anti-SLAPP statute is not governed by the form of the plaintiff's complaint. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 92.) The issue instead depends on the substantive nature of the cause of action and whether the defendant's alleged activities giving rise to this asserted liability constitutes protected speech or petitioning. (*Ibid.*) Although the procedural background of the prior case was relevant to explain the claimed basis for liability, the substance of the O'Briens' claim is grounded on the existence of the final judgment and the relationship between the Control Committee and the Committee Members. Thus, the allegations describing the prior litigation history are not determinative on the issue whether the claim arises from the Committee Members' exercise of their constitutional rights.

The Committee Members' reliance on *Navellier v. Sletten, supra*, 29 Cal.4th 82 is misplaced. In *Navellier*, the plaintiff sued the defendant (Sletten) for breach of contract because Sletten had filed a counterclaim in a prior federal action on a cause of action that Sletten had expressly agreed in writing to release. (*Id.* at pp. 85-87.) The high court found that because the essence of Sletten's allegedly wrongful conduct was Sletten's prior filing of the federal counterclaim, the plaintiff's cause of action necessarily arose from Sletten's acts in furtherance of his constitutional right of petition. (*Id.* at p. 90.) The O'Briens did not similarly sue the defendants in this case for their alleged wrongful actions in filing the prior lawsuits. Instead, they seek to recover against the Committee

Members based on the prior judgment on theories of res judicata, collateral estoppel, and/or alter ego.

Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, is likewise distinguishable. In *Ludwig*, the plaintiff sued a developer for encouraging others to file lawsuits and to speak against a competing project at public hearings. (*Id.* at pp. 12-14.) In opposing an anti-SLAPP motion brought by the developer, the plaintiff argued that the lawsuit did not arise from the developer's exercise of his constitutional petition rights because he merely encouraged others to exercise their petition rights. (*Id.* at pp. 16-17.) The court rejected the argument, explaining that "[t]he right to petition the government, or to seek legal redress, does not confer legal protection solely on those persons formally addressing the governmental agency or formally filing a lawsuit," but extends to those who instigate and encourage others to exercise their petition rights. (*Id.* at p. 17, fn. omitted.)

The Committee Members argue that this case is similar to *Ludwig* because one factor in determining liability for a prior judgment under section 1908, subdivision (b) is the extent to which the plaintiff controlled the prior litigation. However, the anti-SLAPP statute's applicability depends on the defendant's activities upon which liability is based, not necessarily on the individual elements or evidence needed to prove such liability. (See *Gallimore v. State Farm Fire & Casualty Ins. Co.*, *supra*, 102 Cal.App.4th at pp. 1398-1399.) Because the current action is fundamentally based on the judgment rather than the prior litigation activities, the need to prove the control factor does not convert the action into a claim arising from the Control Committee Members' constitutional petitioning rights.

Because the O'Briens' lawsuit is not subject to the anti-SLAPP statute, we do not reach the issue whether it is probable the O'Briens will prevail on their action. We recognize that it is tempting to reach the merits of a lawsuit on an anti-SLAPP motion where it appears the matter may concern solely a legal question. However, a court has no authority to preliminarily decide the merits of the action if the matter is not governed by the anti-SLAPP statutory procedure. If the O'Briens' lawsuit is indeed devoid of merit, the Committee Members have many procedural avenues to bring this to the attention of the trial court. In this regard, we note that the fact that the O'Briens did not raise the alter ego theory in response to the anti-SLAPP motion does not necessarily preclude them from raising this theory in the trial court or on separate motion to amend the prior judgment.

DISPOSITION

Judgment reversed. The O'Briens to recover costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.